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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1219

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

Petitioner,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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—

The Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 2, 1977.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Indiana is not yet officially reported. A copy of this opinion is appended hereto as Appendix A. The opinion of the Court of Appeals is not yet officially reported. A copy of this opinion is appended hereto as Appendix B.

JURISDICTION.

The date of the order and judgment of the Court of Appeals for the Seventh Circuit is February 2, 1977.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

In this action the Bishop of the Roman Catholic Diocese of Gary, Indiana, on grounds of actual and threatened violation of, *inter alia,* the Religion Clauses of the First Amendment, sought injunctive relief to enjoin the application of the National Labor Relations Act to the schools under his religious authority, which schools this Court has held to be an "integral part of the religious mission of the Catholic Church." The preliminary injunction granted by the District Court was vacated by the Court of Appeals on the ground of want of District Court jurisdiction in that (a) "developing a factual record in labor disputes is a task peculiarly within the competence of the Board", and (b) "the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." The questions presented therefore are:

1. Has a District Court of the United States jurisdiction to preliminarily enjoin application of the National Labor Relations Act to schools which are an integral part

of the religious mission of a church where that court finds (a) that the plaintiff seeking the injunction has raised substantial claims under the Religion Clauses of the First Amendment and (b) that to inject the NLRB into the internal structure of those religious schools and to force the plaintiff to await exhaustion of agency proceedings under the Act constitutes irreparable harm to him?

2. Does the requirement of exhaustion of administrative remedies deny due process of law to religious litigants who raise substantial claims under the Religion Clauses of the First Amendment and are faced with immediate and irreparable harm, where the administrative agency has no specialized competence in the fields of religion or of constitutional law, where prior decisions of that agency show that continuation of the administrative process would be futile, and where continuation of that process will not dispose of the constitutional challenges raised?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the Religion Clauses of the First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The statute giving the District Court power to issue the injunction is 28 U. S. C. § 1331. The statute, the application of which has been challenged by the Petitioner, is 29 U. S. C. § 141, *et seq.* (the National Labor Relations Act). Appendix D.

STATEMENT OF THE CASE.

Bishop Andrew G. Grutka, the Petitioner,[1] is governing head of the Roman Catholic Diocese of Gary, Indiana, and is charged by the law of his Church with ultimate responsibility, both spiritual and temporal, for the Catholic schools of the diocese. On September 16, 1976, the Bishop filed a complaint against the National Labor Relations Board,[2] seeking a preliminary and permanent injunction against application of the National Labor Relations Act to those schools and thus to restrain NLRB from further asserting jurisdiction over, or taking any action with respect to, Catholic schools, or teachers therein, of the Diocese of Gary and from holding an election which NLRB had ordered for October 7, 1976, for the lay teachers in those Catholic schools. The complaint also sought to enjoin NLRB's proceeding further under the Act in prosecuting an unfair labor practice charge against the Bishop. Finally, the complaint sought a declaratory judgment that the National Labor Relations Act is unconstitutional as applied to the said Catholic schools which are an integral part of the religious mission of the Catholic Church.

On September 24, 1976, the Bishop filed a Motion for Temporary Restraining Order to enjoin application of the Act to the schools on the ground of immediate and irreparable injury caused to him thereby through violation of his rights under the Religion Clauses of the First Amendment and under the Fifth and Ninth Amendments to the Constitution of the United States. To this Motion was appended the affidavit of F. Raymond Fowerbaugh, which affidavit included verification of the allegations of the complaint as well as specification of facts believed to constitute irreparable harm.

1. Hereinafter also referred to as "the Bishop".
2. Hereinafter referred to as "NLRB", or "the Labor Board".

On September 30, 1976, NLRB filed a Motion to Dismiss for lack of subject matter jurisdiction or alternatively for summary judgment. On October 5, 1976, the District Court, after hearing, issued a preliminary injunction enjoining all further action[3] by NLRB in exercising its jurisdiction. The District Court, basing its holding in part on *Leedom v. Kyne*, 358 U. S. 188 (1958), stated:

> "This Court views the plaintiff's arguments as somewhat consistent with that of the plaintiff in *Leedom*. In both cases the plaintiff alleged the NLRB exceeded its delegated powers. In *Leedom*, the NLRB violated a specific prohibition of the Act. In the instant cause, the plaintiff alleges the regulatory excess violates not a statutory prohibition but the Constitution itself." (App. A, A4).

The Court held the Bishop's challenge not frivolous but as involving "fundamental Constitutional issues" of great magnitude (App. A, A5) and of far-reaching importance (App. A, A3).

The District Court also based its holding on *McCulloch v. Sociedad Nacional*, 372 U. S. 10 (1963), stating:

> "If the *Leedom* exception [to a general rule requiring exhaustion of administrative remedies] can be read to include questions of national interest, surely alleged governmental intrusion into the ultra-sensitive First Amendment area of religion qualifies to allow district court jurisdiction based on *Leedom*." (App. A, A5).

Thereafter NLRB and the Respondent Union appealed to the United States Court of Appeals for the Seventh Cir-

3. The District Court permitted the scheduled election to take place, the ballots, however, to be impounded uncounted.

cuit. Oral argument took place on January 21, 1977, and on February 2, 1977, the Court of Appeals vacated the preliminary injunction on the ground that the District Court lacked subject matter jurisdiction. The principal reasons stated by the Court of Appeals for its decision were (a) that "developing a factual record in labor disputes is a task peculiarly within the competence of the Board" (App. B, A13), and (b) that "the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." (App. B, A14).

The Court sought to distinguish *Leedom v. Kyne* with the following statement:

> "Unlike *Kyne*, this case presents no patent disregard by the Board of its statutory jurisdiction." (App. B, A11).

It held that the nature and scope of state entanglement with religion could only be assessed through a factual record, and that developing a factual record "in labor disputes is a task peculiarly within the competence of the Board." (App. B, A12, A13).

The Court of Appeals' opinion contains no discussion of the facts which were in the record before it—the aforementioned affidavit of F. Raymond Fowerbaugh or the facts contained in the verified complaint, a motion to dismiss which had been made.

On February 11, 1977, pursuant to the mandate of the Court of Appeals, the ballots which had been cast in the October 7, 1976, election were counted, the majority of the teachers rejecting the Union as their bargaining representative. Objections to the Election were filed by the Union with NLRB February 15, 1977, thus extending the representation proceedings. Proceedings in the unfair labor practice charge case have been scheduled to resume

March 7, 1977. In the face of the resumption of the exercise of NLRB jurisdiction over his schools, the Petitioner, on February 22, 1977, applied to Mr. Justice Stevens for a stay in enforcement of the judgment and mandate of the Court of Appeals pending the filing of a Petition for Certiorari and disposition of that Petition by this Court.

The basis for jurisdiction in the federal District Court is 28 U. S. C. § 1331.

REASONS FOR GRANTING THE WRIT.

The questions presented are of first impression nationally. They pertain to the rights of churches to have prompt access to courts of law at the *beginning of—and not long after*—the assertion of governmental power over their religious mission. The questions bring to light a serious and nationally significant misapplication by a United States Court of Appeals of decisions of the Supreme Court with respect to the power and jurisdiction of the District Courts of the United States, especially in First Amendment cases.

1. The Court of Appeals decision while citing *Leedom v. Kyne, supra,* in fact largely nullifies it. In *Kyne,* the Supreme Court held that a District Court may intervene in NLRB proceedings where the Board has acted in excess of its statutory authority. By obvious implication the Court also held that the District Court had power to make its own determination of whether NLRB's action was in excess of its authority. The Court of Appeals broadly acknowledged that a District Court could enjoin exercises of Board jurisdiction which are in excess of its statutory authority or are unconstitutional (App. B, A12). But it held that a District Court *is without power to make its own determination as to whether such unlawful exercise exists.* That, said the Court of Appeals, is (a) because this is a "labor case" (and "labor cases" call for fact determinations by the Labor Board) and (b) because excessive entanglements between church and state are alleged (and these call for fact-finding which the Labor Board, and not a District Court of the United States, is solely competent to make).

The conclusion thus reached by the Court of Appeals largely blights the decision of the Supreme Court in *Kyne,*[4] since, for example, in a wide variety of cases involving executive invasion of personal liberty, District Courts feeling bound to follow the Court of Appeals decision would decline jurisdiction in favor of administrative bodies without competence (and usually without the independence) to weigh issues of a delicacy and complexity which have at times proved formidable even to this Honorable Court.

2. The denial here of early access to judicial review is a singularly important issue demanding Supreme Court review. If this Court upheld District Court jurisdiction in *Kyne,* where only action in excess of statutory authority was involved, it ought surely to uphold such jurisdiction where action alleged to be in excess of what is permissible under the Religion Clauses is involved. If this Court upheld District Court jurisdiction in *Sociedad Nacional,* where "public questions particularly high in the scale of our national interests" were involved, it ought surely to uphold such jurisdiction where the Free Exercise of religion is involved. Protection of rights of religious liberty has been deemed so essential a concern as to even override public interests which are at "the very apex of a function of a State." *Wisconsin v. Yoder,* 406 U. S. 205, 213 (1972). Indeed, this Court has upheld District Court jurisdiction to enjoin agency proceedings on the basis of constitutional claims in numerous other cases outside the

4. The Court of Appeals dealt likewise with the Supreme Court's decision in *McCulloch v. Sociedad Nacional,* 372 U. S. 10 (1963), by refusing to recognize a claim under the Religion Clauses of the First Amendment as "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." (App. B, A12). *Cf., Public Funds for Public Schools v. Marburger,* 358 F. Supp. 29, 43 (D. N. J. 1973), *aff'd.* 417 U. S. 961 (1974).

context of NLRA-mandated representation proceedings. See, *Public Utilities Commission of California v. United States,* 355 U. S. 534 (1958), *Aircraft & Diesel Equipment v. Hirsch,* 331 U. S. 752 (1947), *Weinberger v. Salfi,* — U. S. —, 95 S. Ct. 2457 (1975). The decision of the Court of Appeals is at variance with the principles clearly announced in all of these cases.

3. The grossness of the possible results are highlighted in the present case. Here the complaint alleged facts in support of claims under the Religion Clauses of the First Amendment which the District Court held to be substantial claims. The Court of Appeals, presumably, in view of the fact that NLRB was a party defendant, labeled and defined the case as a "labor case" and, having done that, granted the motion to dismiss, totally ignoring the universally established rule in the federal courts that a motion to dismiss a complaint must be deemed to admit the allegations of the complaint as true. *U. S. v. New Wrinkle,* 342 U. S. 371, 373 (1952). The Court of Appeals decision, therefore, must also be taken to stand for the broad proposition that, where District Court relief is sought against an administrative agency which moves to dismiss the complaint, that court may not so respect the allegations of the complaint.

4. It is respectfully urged, also, that this Court be concerned over the Court of Appeals' decision as a rule requiring bona fide religious litigants to undergo administrative proceedings (whose pace and duration—and thus burdens and cost—government is free to set) where such litigants raise (as here) non-frivolous, substantial claims which directly attack the application of an Act under the First Amendment and not mere maladministration. This is particularly of moment where, as here, the

administrative agency is without even a vestige of specialized competence in the field of constitutional law and has less than that in the field of religion.

5. Related is the futility of the attempting, by religious schools, to raise issues of religious liberty before the National Labor Relations Board which at least five times before has declared its jurisdiction over religious schools on the basis of its self-made definition thereof as not "completely religious",[5] in direct contradiction to this Court's opinions. See *e.g., Lemon v. Kurtzman,* 402 U. S. 602, 618 (1971).

Most of all, the decision of the Court of Appeals lays down the pernicious doctrine that irreparable harm to a church is not to be presumed from the very fact of the first assertion by government over that which lies at the very heart of its religious mission; that therefore the church must be denied access to the courts until government has completed its processes of interrogating it, investigating it, telling its employees of alleged statutory rights against it, and using against it government's full weaponry of summonses, subpoenas and hearings.

As the District Court stated in *Caulfield v. Hirsch,* — F. Supp. — (E. D. Pa., Feb. 17, 1977, No. C. A. 76-276): "This is not a labor case but a First Amendment case."[6] It therefore initially belongs in a District Court of the United States.

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5. See, *e.g., Roman Catholic Archdiocese of Baltimore et al. and Baltimore Lay Teachers' Organization,* 88 LRRM 1169 (1975).

6. The District Court in *Caulfield* did not issue an opinion. Appended as Appendix C, therefore, are the relevant pages of the transcript of the hearing on preliminary injunction therein on February 17, 1977, containing the comment of Hon. Donald W. VanArtsdalen, District Judge, on the instant (*Grutka*) case.

CONCLUSION.

For all of the foregoing reasons it is respectfully requested that this Petition be granted.

Respectfully submitted,

WILLIAM B. BALL,
WILLIAM J. O'CONNOR,
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. H 76-249

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,
Plaintiff

v.

ALEX V. BARBOUR, Regional Director for the Thirteenth Region, National Labor Relations Board,
Defendant

Memorandum Decision.

This cause came on to be heard on September 30, 1976, on the motion of the plaintiff, Andrew G. Grutka, Bishop of the Catholic Diocese of Gary, for a Temporary Restraining Order, enjoining the defendant, Regional Director of the National Labor Relations Board (hereafter NLRB), from further asserting jurisdiction with regard to the lay teachers employed by the Catholic schools located within the Diocese of Gary. Plaintiff further seeks to restrain the NLRB from further proceeding in Case No. 13-CA-15445 before the National Labor Relations Board relating to an unfair labor practice charge filed against the plaintiff, on the grounds that immediate and irreparable

injury is resulting and will result to the plaintiff from such actions. Also before the Court was a motion to dismiss or in the alternative for summary judgment filed by the defendant, NLRB. The motion to dismiss was considered at the hearing to the extent that it challenged the jurisdiction of this Court.

The plaintiff's argument is posited on the ground that the Wagner Act as amended by the Taft Hartley Act of 1947, 29 U. S. C. § 141 et seq. cannot constitutionally be protracted to apply to labor relations between the Catholic Diocese of Gary and lay teachers in their parochial schools, as to do so would violate rights guaranteed by the First Amendment of the United States Constitution. The plaintiff further alleges that the Labor Management Relations Act of 1947 was designed to deal with essentially industrial labor relations matters and conferred no jurisdiction upon the NLRB to interfere in intra-church matters intimately related to the formation and preservation of religious beliefs.

The defendant, NLRB, argues that this Court does not have subject-matter jurisdiction over issues of labor representation. Such issues the defendant argues are within the exclusive jurisdiction of the NLRB, until the exhaustion of administrative remedies, and then appealable to a United States Court of Appeals. Furthermore, the NLRB denies that its assertion of jurisdiction interferes with the First Amendment rights of the plaintiff or that the plaintiff is suffering or will suffer immediate and irreparable harm.

The same parties, in an essentially identical controversy, were before this court in *Grutka v. NLRB,* Hammond Civil No. H 75-251, at which time the Honorable Allan Sharp granted a temporary restraining order. That order was later dismissed by the Court on the basis that the

cause was inappropriate for hearing before a three judge panel as requested.

This Court heard extensive argument from counsel for both the plaintiff and the NLRB. Additionally, counsel representing the Lay Teachers Federation of the Gary Diocese, American Federation of Teachers, was permitted to argue as amicus curiae in order to allow all interested parties an opportunity to be heard.

Counsel for all parties made it abundantly clear that the matter before the Court involves Constitutional issues of far-reaching importance. The Court agrees with that assessment.

The Court is well aware that, barring extraordinary circumstances, district courts have no jurisdiction to adjudicate or intervene in labor representation controversies or charges of unfair labor practices. *Boire v. Greyhound Corporation,* 376 U. S. 473, 84 S. Ct. 894 (1964); *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 401, 60 S. Ct. 300 (1940); *Vapor Blast Manufacturing Co. v. Madden,* 280 F. 2d 205 (7th Cir. 1960). However, under certain extraordinary circumstances district courts have exerted jurisdiction with later appellate approval. In *Leedom v. Kyne,* 358 U. S. 184, 79 S. Ct. 180 (1958), a union president sued the NLRB in a district court to set aside certification of a bargaining unit which included both professional and non-professional employees. When the district court entered judgment for the union, the NLRB appealed. The D. C. Circuit upheld the decision against the NLRB's argument that the district court had no jurisdiction. The United States Supreme Court affirmed, holding that the district court had jurisdiction where the absence of jurisdiction of the federal courts would mean a sacrifice or obliteration of a right which Congress gave professional employees, 358 U. S. at 190, 79 S. Ct. at 185.

The Supreme Court in *Leedom* distinguished between "review" of a NLRB decision in district court which the Act forbids and an action to strike down an order made in excess of its delegated powers. The Court in *Leedom* held that when the NLRB exceeded its delegated powers by acts specifically prohibited by the Act, a federal district court has jurisdiction of an original suit. *Leedom,* supra, at 358 U. S. 188, 189, 79 S. Ct. 184.

This Court views the plaintiff's argument as somewhat consistent with that of the plaintiff in *Leedom.* In both cases the plaintiff alleged the NLRB exceeded its delegated powers. In *Leedom,* the NLRB violated a specific prohibition of the Act. In the instant cause, the plaintiff alleges the regulatory excess violates not a statutory prohibition, but the Constitution itself.

The plaintiff's complaint states a constitutional challenge to a government agency's actions which is not clearly frivolous. This Court is constrained to view any regulatory excess which is allegedly violative of the First Amendment to sufficiently constitute "a sacrifice or obliteration" of a protected right so as to confer jurisdiction on a district court.

Another extraordinary circumstance was noted in *McCulloch v. Sociedad Nacional,* 372 U. S. 10, 83 S. Ct. 671 (1963). In that case, the NLRB sought to conduct a representation election between an American-owned Honduran employer and foreign employees. In *McCulloch,* the Supreme Court held that a district court could exercise jurisdiction based upon the exception fashioned in *Leedom v. Kyne,* supra. While the NLRB in *McCulloch* violated no specific prohibition as in *Leedom,* the Court found that the absence of this requirement could be overcome by the "presence of public questions particularly high in the scale of our national interest because of their international complexion . . ." If the *Leedom*

exception can be read to include questions of national interest, surely alleged government intrusion into the ultra-sensitive First Amendment area of religion qualifies to allow district court jurisdiction based on *Leedom.*

The case of *Fay v. Douds,* 172 F. 2d 720 (2nd Cir. 1949), also provides an exception to the general rule requiring exhaustion of intra-agency appeal procedures. In *Douds,* the Second Circuit held that constitutional challenges, not "transparently frivolous," could be litigated in district courts. The Court agrees with the NLRB that the *Douds* decision has been severely limited. Most decisions rejecting *Douds* such as *Vapor Blast v. Madden,* supra, are situations where the constitutional challenge is based on due process or a property right, where the jurisdiction of the NLRB was not attacked. In the instant cause, the constitutional challenge is based upon our most sacred amendment, and directly confronts the NLRB's authority to regulate.

The administrative doctrine requiring exhaustion of administrative remedies before resorting to the courts is a long-standing one. However, that doctrine alone is not sufficient to thwart a judicial remedy where a government agency exceeds its delegated authority. *Pan American Petroleum Corp. v. Pierson,* 284 F. 2d 649 (1960); *Varney v. Warhime,* 147 F. 2d 238 (1945).

The fundamental Constitutional issues involved in this proceeding are of such magnitude as to overshadow the particular parties themselves. No freedoms more fully demonstrate the commitments made by our founding fathers than those contained in the First Amendment, and none should be more zealously safeguarded.

The dual nature of a church-school in its religious-social mission requires constant faculty supervision and cooperation among teachers. Our Constitution guarantees the right to propagate religious beliefs through such

institutions. This Court cannot but consider the alleged harmful effect which awaiting the exhaustion of internal NLRB appellate proceedings may have on the plaintiff's right to provide religious instruction. The injection of the NLRB into the internal structure of the parochial schools of the Diocese of Gary necessarily accentuates any dissention among the teachers, both lay and religious.

This Court is of the opinion that the allegations contained in the plaintiff's complaint provide a sufficient jurisdictional basis for judicial action at the district court level. The constitutional challenge posited by the plaintiff is of particular note in that it concerns the First Amendment, and that it asserts that the Labor Management Relations Act of 1947 does not convey jurisdiction over church-schools.

As the remedy sought is equitable in nature, the Court must balance the equities and consider the effects its ruling may have on the parties. Since the Court's decision rests on jurisdictional and constitutional grounds supported by the record, the Court feels no necessity existed to hear evidence.

It has been brought to the attention of the Court that there is presently pending before the United States Court of Appeals for the Seventh Circuit a case which embraces essentially the same constitutional issues as does the cause before this Court. (*Catholic Bishop of Chicago v. NLRB*, No. 76-1600). The Court is of the opinion that the NLRB may have exceeded Constitutional limits in exercising jurisdiction over lay teachers in parochial schools, but before entering a final decision on the question, the Court feels constrained to await further guidance from the Seventh Circuit.

While the plaintiff contends in his complaint and motion for a temporary restraining order that immediate and irreparable harm will result from any further actions by

the NLRB, both the NLRB and the counsel for the Lay Teachers Federation effectively argued that a blanket injunction would do irreparable harm to their cause. It was persuasively brought to the attention of the Court that a representative election in the parochial schools of the Diocese of Gary has been scheduled for October 7, 1976; that such election has been scheduled for some time with considerable expense for advertising, and that any delay in the election would cause irreparable harm to the teachers seeking representation.

After considering the competing equities involved, it is the decision of the Court that upon the completion of the representation election set for October 7, 1976, the NLRB impound the uncounted ballots and thereafter be restrained from proceeding with the representation controversy, pending final Court action. The NLRB is further restrained from proceeding with Case No. 13-CA-15445 until such time as the Seventh Circuit renders a decision in *Catholic Bishop of Chicago v. NLRB*, No. 76-1600. In the event the awaited decision does not address the issues which are uppermost in this cause, this Court will hear further argument and render a decision as to whether the injunction should be made permanent.

At the conclusion of arguments heard on September 30, 1976, the amicus curiae representing the Lay Teachers Federation and counsel for the NLRB orally moved that the Court certify the issue of this Court's jurisdiction for immediate appeal pursuant to 28 U. S. C. § 1292(b). The Court grants the oral motion to certify as the issue involves a question of law as to which there is substantial ground for a difference of opinion.

Enter: October 5, 1976.

PHIL M. MCNAGNY, JR.,
Judge, United States District Court.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 76-2129 and 76-2130

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,
Plaintiff-Appellee,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board, et al.,
Defendants-Appellants.

On Appeal From the United States District Court for the Northern District of Indiana, Hammond Division.
H-76-249—Phil M. McNagny, Jr., *Judge.*

ARGUED JANUARY 21, 1977 — DECIDED FEBRUARY 2, 1977

Before CUMMINGS, PELL and SPRECHER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In October 1975, the Union [1] filed a representation petition with defendant Alex Barbour, the Regional Director of the 13th Region of the National Labor Relations Board, seeking an election in a

1. The Lay Teachers Federation of Gary Diocese, Local 3493, American Federation of Teachers.

unit composed of lay teachers [2] employed by the Roman Catholic Diocese of Gary, Indiana, in its grammar and high schools. After a hearing, Barbour determined that the Board had jurisdiction and scheduled a representation election for October 7, 1976. The election took place but the ballots have not yet been counted.

In May 1976, the president of the Union filed an unfair labor practice charge against the defendant Bishop of the Catholic Diocese of Gary, Indiana, alleging that the union official had been discharged because of his union activities, in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (29 U. S. C. §§ 158(a)(1) and (3)). Thereafter a complaint issued and a trial began before an administrative law judge on September 21, 1976. The General Counsel's case-in-chief has been closed.

On September 16, 1976, the Bishop filed a complaint in the district court seeking to enjoin the Board from holding the October 7, 1976, representation election, from continuing with the unfair labor practice proceeding, and from asserting jurisdiction over the Bishop. The court was asked to declare the National Labor Relations Act unconstitutional as applied to lay teachers in parochial schools. Eight days later the Bishop also sought a temporary restraining order seeking similar relief.

On October 5, 1976, the district court handed down a memorandum decision enjoining the counting of the ballots in the representation election or any other proceedings in the representation case and enjoining further proceedings in the unfair labor practice case pending this Court's determination of the constitutional issue in *Catholic Bishop of Chicago v. National Labor Relations Board,* No. 76-1600,

2. The unit sought by the Union included all of the full-time and part-time lay teachers, counselors, librarians and school nurses employed by the Diocese. For convenience, we refer to the members of the units as "lay teachers."

argued here on January 21, 1977, and now *sub judice*. Relying primarily on *Leedom v. Kyne*, 358 U. S. 184, the district court held that it had jurisdiction because the plaintiff had presented a "not clearly frivolous" First Amendment challenge to the Board's actions. On October 26, the Union was permitted to intervene as a defendant, but its motion to modify the preliminary injunction in order to tally the ballots cast was denied. Thereafter, the Board and Union appealed.[3]

It is well settled that district courts generally do not have jurisdiction to enjoin the Labor Board from conducting representation or unfair labor practice proceedings. Under Section 10 of the National Labor Relations Act (29 U. S. C. § 160), with exceptions which are immaterial here, the exclusive means of obtaining judicial review of Board rulings by an aggrieved party is in a court of appeals. Normally, the administrative remedies extant before the Labor Board must be exhausted as a prerequisite to federal jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48-49; *Chicago Automobile Trade Association v. Madden*, 328 F. 2d 766, 768-769 (7th Cir. 1964), certiorari denied, 377 U. S. 979; *Vapor Blast Manufacturing Co. v. Madden*, 280 F. 2d 205, 208-209 (7th Cir. 1960), certiorari denied, 364 U. S. 910. *Catholic Bishop of Chicago, supra*, arrived at our judicial door through this usual procedural route.

However, an extraordinary procedural route, first charted by *Leedom v. Kyne*, 358 U. S. 184, exists occa-

3. Although the district court's opinion addressed issues raised in the plaintiff's motion for a temporary restraining order, it is clear from the indefinite temporal extent of the restraint imposed that the restraining order must be treated as a grant of a preliminary injunction for purposes of appellate jurisdiction under 28 U. S. C. § 1292(a)(1). *Sampson v. Murray*, 415 U. S. 61, 85-88. Indeed, in its subsequent order permitting union intervention, the court denied the Union's motion "to modify the *preliminary injunction*." (Emphasis supplied.)

sionally. In *Kyne*, the Board included both professional and nonprofessional employees in the bargaining unit that it found appropriate after refusing to take a vote among the professional employees of a labor organization to determine whether a majority of them would "vote for inclusion in such unit," as mandated by Section 9(b)(1) of the National Labor Relations Act (29 U. S. C. § 159 (b)(1)). As a result, it could properly be said of the suit in *Kyne* that it

> "is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U. S. at 188.

Therefore the fact-finding mission, the considerations of administrative expertise and the desire to prevent litigious interruptions of the on-going administrative process, which together make up the *raison d'etre* of the exhaustion doctrine (*Weinberger v. Salfi*, 422 U. S. 749, 765), are simply irrelevant when the Board has clearly breached the bounds of its proper authority as a matter of law. See *Machinery, Scrap Iron, etc. Employees, Local 714 v. Madden*, 343 F. 2d 497, 499 (7th Cir. 1965), certiorari denied, 382 U. S. 822; cf. *Federal Trade Commission v. Feldman*, 532 F. 2d 1092, 1096 (7th Cir. 1976); *Federal Trade Commission v. Miller*, – F. 2d – (7th Cir. Jan. 24, 1977). Unlike *Kyne*, this case presents no patent disregard by the Board of the bounds of its statutory jurisdiction.[4]

4. The memorandum decision also relied upon *McCulloch v. Sociedad National*, 372 U. S. 10, 16-17, where the district court enjoined a Board order requiring an election for seamen on ships flying a Honduran flag of convenience, which had caused international protests. The Supreme Court, in ratifying the district court's jurisdiction, explicitly stated that *Sociedad National* is "not

It may be assumed that *a fortiori* a district court could enjoin an exercise of Board jurisdiction which was unconstitutional as a matter of law. In the religious area, the essence of First Amendment inquiry is entanglement, *i.e.*, whether the involvement of the state has improperly established religion or impermissibly interfered with the free exercise of a religious belief. See *Roemer v. Board of Public Works*, – U. S. –, 44 LW 4939; *Tilton v. Richardson*, 403 U. S. 672; *Lemon v. Kurtzman*, 403 U. S. 602; *Wisconsin v. Yoder*, 406 U. S. 205. But the nature and scope of the state entanglement attacked can only be measured against a factual record delineating the character of entanglement which assertedly arises from the state intrusion. Where, as here, the very operation of the exhaustion doctrine serves to create a record upon which the constitutionality of application of the challenged statute may be judged, a premature review in the district court is singularly inappropriate. As the Supreme Court noted in *Boire v. Greyhound Corp.*, 376 U. S. 473, 481, when the central question in a labor case

> "is essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute ° ° ° [the Court will not] permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with law. Judicial review in such a situation has been limited by Congress to the courts of appeals ° ° °."

4. (Cont'd.)
to be taken as an enlargement of the exception in *Kyne*." 372 U. S. at 17. Indeed, the critical national interest involved in *Sociedad National* was so compelling that the "[i]mportant interests of the immediate parties" were subjugated entirely to a "uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." *Id.*

The Bishop raises two somewhat related arguments which assert that in the context of the First Amendment, the matter of law/matter of fact distinction outlined above is an overly facile solution to the problem of when district court jurisdiction is appropriate. The Bishop's first argument is that for any constitutional challenge to administrative action, the need for exhaustion is vitiated since the Board is inherently unsuited to judge the constitutionality of the National Labor Relations Act. It is true that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich v. Selective Service Local Board No. 11*, 393 U. S. 233, 242 (Harlan, J., concurring); *Public Utilities Commission of California v. United States*, 355 U. S. 534, 539-540. However, in these cases, the factual predicate has not been in dispute, so that the only issue remaining was the constitutionality of the statute as a matter of law. *Mathews v. Diaz*, 44 LW 4748; *Wilson v. Edelman*, 542 F. 2d 1260, 1271-1273 (7th Cir. 1976). The matter of fact/matter of law distinction of *Boire*—the difference between a challenge to the application of a particular provision of a statute to a particular set of facts as contradistinct from a challenge to the particular provision on its face—which respectively operates to deny or permit district court jurisdiction—is a proper governing principle when the allegedly *ultra vires* action by the agency is attacked on constitutional grounds. *Johnson v. Robison*, 415 U. S. 361, 366-368; *Weinberger v. Salfi*, 422 U. S. 749, 761-762. Since the dimension of state-church entanglement can only be intelligently assessed against a developed factual background and since developing a factual record in labor disputes is a task peculiarly within the competence of the Board, we recognize the importance here of permitting the exhaustion doctrine to run its normal

course. Because the Bishop does not seek review of agency action bottomed on the plain wording of a statute which is alleged to be facially unconstitutional, the *Boire* teachings on the rare availability of district court review are freely transferrable to the constitutional realm.[5] *Weinberger v. Salfii*, 422 U. S. 749, 764-767. Cf. *Wilson v. Edelman*, 542 F. 2d 1260, 1273 (7th Cir. 1976).

The Bishop's second argument is based on the character of his constitutional attack. Apart from the theoretical resolution of a generalized constitutional attack on the Board's actions, the Bishop asserts that a challenge on First Amendment grounds presents special conceptual problems deriving from the "chilling effect" of First Amendment theory, citing *Wolff v. Selective Service Board No. 16*, 372 F. 2d 817, 823-825 (2d Cir. 1967).[6]

The constitutional allegations of this complaint do not confer jurisdiction upon the district court because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights.[7] The cases relied upon

5. In fact, the *Boire* distinction has been applied to review of Selective Service Board action involving religious-based exemptions and deferments. Pre-induction review in the courts in the face of a statute which prevented the same is allowed only to resolve claims that the statutes or regulations administered are invalid on their face. Compare *Oestereich v. Selective Service Local Board No. 11*, 393 U. S. 233, and *Breen v. Selective Service Local Board No. 16*, 396 U. S. 460, with *Clark v. Gabriel*, 393 U. S. 256 and *Fein v. Selective Service System Local Board No. 7*, 405 U. S. 365. See generally Hart & Wechsler, The Federal Courts and the Federal System 365-372 (2d ed. 1973).

6. *Wolff* involved a claim that the Board had misapplied the applicable statutes or regulations in revoking a draft deferment for participation in a demonstration, and not a challenge to the validity of the laws themselves. In this light, *Wolff* clearly did not survive the draft cases in the Supreme Court's 1968 October Term. See note 5 *supra*.

7. The district court opinion also relied on *Fay v. Douds*, 172 F. 2d 720 (2d Cir. 1949). If still viable, *Fay* is inapplicable because Bishop Grutka is not asserting a vested property right with respect to a collective bargaining agreement where he has no way

in the memorandum decision below and by the plaintiff before this Court are inapplicable because there simply is no unavoidable "chill." If the Union wins this election and is certified by the Board, the plaintiff may refuse to bargain with the Union and test the validity of the Board's jurisdiction in this Court. Similarly, if the union president should prevail in his unfair labor practice trial, the plaintiff can defend an enforcement suit in this forum. Thus the *status quo* in this case does not impede the free exercise of religious belief.

In holding that the district court has no jurisdiction, we are not passing on the merits of the controversy. For want of jurisdiction, the district court's order will be vacated to permit the Board to proceed to conclude both the representation and unfair labor practice cases. Any First Amendment challenge may later be presented in this Court.

The order of October 5, 1976,[8] is vacated and set aside with directions to dismiss the action. Our mandate shall issue forthwith.

7. (Cont'd.)
of ultimately obtaining judicial review. *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752, 773-774, relied on by the plaintiff, is likewise inapposite because "inadequacy of the prescribed procedure and impending harm" have not been sufficiently shown.

Since the plaintiff's constitutional rights have adequate protection in the Court of Appeals, Congress' decision to place exclusive jurisdiction in this Court is unchallengeable. *Lockerty v. Phillips*, 319 U. S. 182. See generally Hart & Wechsler, The Federal Courts and the Federal System 313-324 (2d ed. 1973).

8. Insofar as the district court's order of October 26, 1976, refused to modify its preliminary injunction to allow the tally and disclosure of the ballots cast on October 7, 1976, it is also vacated.

APPENDIX C.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Caulfield v. Hirsch, Civil Action No. 76-279

Transcript of Proceedings on Application for Preliminary Injunction Before Judge Donald W. VanArtsdalen February 17, 1977.

Despite the factual differences between the case presently before me and the Grutka case, which might be utilized to distinguish the two cases, I find such factual differences to be insubstantial as to any controlling legal issues regarding this Court's jurisdiction.

Grutka, as I read the case, squarely held that the District Court had no jurisdiction.

Rather than attempting to differentiate the cases on some factual grounds intellectual integrity leads me to conclude that if this District Court, either as a single judge or as a three-judge court, has any jurisdiction then the Grutka case was wrongly decided.

If I as a district judge am to rule differently than that of any Circuit Court of Appeals, albeit a circuit court other than the one in which I am now sitting, and thus not legally compelling or binding upon this Court, but certainly of very strong precedential value, it must be done with great caution and perhaps temerity. Nevertheless, it is my duty to interpret the law and the jurisdictional issues to the best of my understanding.

In the absence of any binding decision from the U. S. Supreme Court or the Third Circuit Court of Appeals, it is up to this Court to decide whether it has jurisdiction in the first instance.

Concluding as I do that this District Court does have jurisdiction of the subject matter, I am of course reminded of the old-age saying, "That fools rush in where angels fear to tread."

I am of the opinion that this case comes correctly within what I will term as the Leedom v. Kyne exception, reported at 358 U. S. 184. There the Supreme Court carved out a narrow exception in which a district court could vacate a determination of the National Relations Board that was made in excess of the powers of the National Labor Relations Board.

Later cases have very narrowly construed Leedom v. Kyne to those situations where the Board clearly exceeds its express statutory powers as set forth in the statute. And this is discussed in the Grutka case.

The difficulty as I see it with such a narrow interpretation is that in order for a District Court to determine whether it has jurisdiction it must first determine the merits of the case, that is it must determine not only that the order exceeds the Board's power but that it clearly does so. To determine the merits of a case in order to determine if a court has jurisdiction it seems to me to be following the old-fashioned expression of "putting the cart before the horse."

The issues in this case to be decided substantively are whether as a matter of statutory construction the Board has exceeded or is attempting to exceed its authority and, if not, whether under the Constitution such statutory authority, if it has been so granted, may be granted to it by Congress.

If in Leedom v. Kyne a District Court has jurisdiction to determine that the National Labor Relations Board exceeded its statutory authority it would seem to me likewise true that a District Court should also be able to determine

whether the National Labor Relations Board is exceeding its authority under the United States Constitution.

There are a few other reasons why I am of the opinion that Leedom v. Kyne exception should be applied in this case. The ordinary commercial or industrial enterprises that may normally be subject to the National Labor Relations Board, where they seek to challenge on statutory or constitutional grounds, of course, the normal procedure would be to refuse to comply with the National Labor Relations Board's order and after enforcement proceedings have the matter determined directly by the Circuit Court of Appeals.

We are here, however, dealing basically with the delicate relationships between the Government and a religious organization under the First Amendment, and an organization whose members comprise a very sizable proportion of our entire population; a religious organization that I think it can be said is devoted to obeying the law.

I deem it wholly inappropriate to rule in such a situation that the only way a challenge to the order of the National Labor Relations Board can be made is to in effect defy the order and force the National Labor Relations Board to seek enforcement proceedings.

Clearly, this case is not the usual type of situation where a single individual must exhaust administrative remedies. Especially in this case we know that however logical the exhaustion of administrative remedies doctrine may be in most instances, here clearly the National Labor Relations Board has made a decision, and there is no reasonable likelihood of any change in that decision. This is not a labor case but a First Amendment case.

I do not deem this as an action to review action of the National Labor Relations Board but rather one that seeks to restrain conduct which is contended to be in excess of its constitutional authority.

In addition, the case of McCulloch v. Sociedad, 372 United States 10, decided in 1962, indicated by its wording, to me at least, that in cases of great public and national interest involving important and compelling issues with respect to the National Labor Relations Board's power, and in certain unique situations, a district court would have jurisdiction. I concede that the facts of the McCulloch case are entirely different from this one, but insofar as involving matters of great public and national interest it does seem to me that this case would fall within the rationale of that exception.

Therefore, I will rule that the District Court has jurisdiction to determine whether the National Labor Relations Board has either the statutory or constitutional authority to order a representation election on behalf of the lay teachers of the elementary schools of the Catholic Schools of the Archdiocese of Philadelphia.

APPENDIX D.

29 U. S. C.

§ 141.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

§ 151.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which

have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow

of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

§ 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for

believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who

engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

§ 159.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees

in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board–

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question

of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

§ 160.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any

agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of

the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or part, any finding or order made or issued by it.

(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of

such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court

of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree en-

forcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of

paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the pur-

poses of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (*l*) of this section.

§ 161.

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party, to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such

proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.